UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-434-06-3978
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: ERNEST J. ADAMS, JR.

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2002

ERNEST J. ADAMS, JR.

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 8 August 1973, an Administrative Law Judge of the United States Coast Guard at Houston, Texas suspended Appellant's seaman documents for one month outright upon finding him guilty of misconduct. The specification found proved alleges that while serving as a tankerman on board the United States Tank Barge LBT-18 under authority of the document above captioned, on or about 16 July 1973 Appellant did cause a spill of approximately 120 gallons of crude petroleum condensate upon the waters of Houston Ship Channel at Robertson Terminal.

At the hearing, Appellant was represented by counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence a diagram of the scene, the testimony of Mr. Marvin Epps, the dockman for Robertson Terminal, and Petty Officer Clark, the Investigator.

In defense, Appellant offered in evidence his own testimony and that of Captain Joseph Courtaux, the tug Captain.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. The Administrative Law Judge then served a written order on Appellant suspending all documents issued to him for a period of one month outright.

The entire decision was served on 23 August 1973. Appeal was timely filed on 7 September 1973.

FINDINGS OF FACT

On 16 July 1973, Appellant was serving as a tankerman on board the United States Tank Barge LBT-18 and acting under authority of

his document while the barge was in the port of Houston, Texas. On that date Appellant was the tankerman in charge of loading three tank barges, of which LBT-18 was one. Prior to arriving at the loading pier he had inspected the valves and piping on all three barges and all was in order. Upon arrival at the pier, three employees of the terminal came on board to hook-up the hoses for transfer operations. After hooking up the first two barges, the terminal employees proceeded to LBT-18. They removed the flange from the port (outboard) side of the header to be used on the starboard (inboard) side of the header to attach the hose, however, the flange did not fit, so they used one of their own. At this point they neglected to replace the flange on the port side header or to place a blind on it. Consequently, when transfer operations began, the oil went straight through the header and was discharged onto the port side deck of the barge and subsequently into the water. Approximately 120 gallons crude petroleum condensate was discharged. At all times during these operations the Appellant was in the vicinity of the barges, but was not directly supervising the hook-up operation. He did inspect the hose connection on LBT-18 prior to commencing transfer, however, he failed to notice that the port side of the header was open.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) The spill was caused by the negligence of the terminal employees and not Appellant

(2) An R.S. 4450 action is in the nature of a criminal proceeding and therefore Appellant has immunity from R.S. 4450 action by virtue of section 311(b) (5) of the Federal Water Pollution Control Act, 33 U.S.C. 1251, et seq.

(3) The sanction imposed is overly severe.

APPEARANCE: For Appellant, Thomas J. Grace, Esq.

OPINION

I

Appellant's first contention is that the spill resulted from the negligence of the terminal employees and not his own. There is no doubt that the terminal employees were negligent in failing to replace the flange on the port side header or to place a blind on it and that they are partly at fault for the spill. Appellant, however, was charged with inattention to duty in that as the

tankerman in charge, he failed to properly supervise the transfer operation. 46 CFR 35.35 places the burden on the "senior deck officer on duty, who shall be a licensed officer or certified tankerman," to supervise and control all phases of the transfer operation. This requirement is to prevent spills resulting from the very circumstances which arose in the instant case - the terminal personnel were of limited experience, they were operating short-handed, and they were moving with great haste to complete the transfer operation. The purpose of having the experienced tankerman in charge is to have a responsible person to actively supervise each phase of the operation in order to compensate for these problems and to insure that personnel involved properly perform their jobs. This means thorough and complete supervision of each phase of the transfer. It is incumbent upon the tankerman in charge to insure that the sequence and pace of the transfer are such that he is able to remain in complete control.

It is the intent of Congress, expressed in the Tanker Act of 1936, as amended by Title II of the Ports and Water-ways Safety Act of 1972, (46 U.S.C. 391a, as amended), to promote marine safety and prevent damage to the marine environment by requiring certificated tankermen on board tank vessels. 46 CFR 35.35, promulgated under the authority of the Tanker Act, requires the tankerman in charge to provide active, complete and thorough supervision of all phases of the transfer operation. It was the failure on the part of Appellant to fulfill this requirement that led to the present action. It is inconceivable that, had Appellant been properly supervising the operation, the terminal employees could have removed the flange from the port side header and transferred it to the starboard side, an action which took about 25 minutes, completely unbeknownst to Appellant. Instead of supervising the hook-up operation in its entirety, Appellant assumed that the terminal employees would do it in the manner in which he expected it to be done and herein lay his error.

II

Appellant next contends that he is immune from an R.S. 4450 action by virtue of section 311(b) (5) of the Federal Water Pollution Control Act, which provides, in relevant part, that a person in charge of a vessel must notify the appropriate authority of any discharge of oil and that such notification and any information developed pursuant thereto cannot be used against the person in any subsequent criminal case. The crux of the issue here is whether an R.S. 4450 proceeding is a "criminal case." Appellant argues that an R.S. 4450 proceeding, while not a purely criminal case, is within the ambit of actions intended to be excluded by Congress. I find no such intent expressed either in the Act or in the legislative history of section 311 (b) (5) or its predecessor,

section 11(b) (4) of the Water Quality Improvement Act of 1971. I have consistently held that R.S. 4450 proceedings are not criminal proceedings, but rather civil or remedial in nature, and I am not persuaded by Appellant's argument that a change in this position is mandated.

The immunity from criminal prosection provided for in section 311(b) (5) is designed to encourage polluters to report spills in order to facilitate a rapid response for containment and recovery by Federal or state agencies in the event that the polluter cannot or does not contain and recover the spill. If he fails to report the spill, he faces the criminal penalties of section 311(b) (5). On the other hand, if he fails in his responsibilities as a tankerman, in that he caused or was responsible for the actual pollution incident, he faces administrative procedures which are civil or remedial. R.S. 4450 proceedings are directed solely to his right to hold certification as a tankerman, and they are in no way related to any criminal actions or proceedings. The procedures under the Administrative Procedure Act provide the Appellant with adequate due process protection while also providing a necessary therapeutic element in the overall efforts to prevent pollution incidents.

III

Finally, Appellant contends that a one month outright suspension is overly severe and not in accordance with the Table of Average Orders, 46 C.F.R. 137.20-165. The scale provided is merely for guidance, and Administrative Law Judges are not bound thereby. The degree of severity of the order is a matter peculiarly within the discretion of the Administrative Law Judge and will be modified on appeal only upon a clear showing that it is arbitrary or capricious. Congress has declared that it is a national goal to eliminate discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone. In furtherance of this goal the policy has been established to issue meaningful orders and penalties in pollution incidents. In the instant case Appellant was in a position of high responsibility with a duty to fully supervise transfer operations in order to insure safe transfer and prevent oil spills. In view of the above stated goal and implementing policy and Appellant's failure to properly perform his duty, the order in the case cannot be said to be excessive.

ORDER

The order of the Administrative Law Judge dated at Houston, Texas on 8 August 1973, is AFFIRMED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D.C., this 19th day of June 1974. INDEX

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